STATE OF MICHIGAN

COURT OF APPEALS

MARIA ROSS,

Plaintiff-Appellee,

v

GREGORY ROSS,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 319576
Wayne Circuit Court
Family Division
LC No. 12-104349-DM

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Gregory Ross, the father of the minor children, appeals as of right the trial court's order to lift the stay, confirm the arbitration award and enter the judgment of divorce, as well as the judgment of divorce. We affirm.

This appeal arises out of a divorce action and custody dispute between Maria Ross, the mother of the minor children, and Gregory. The parties were married in July 1999. They have two minor children together. Maria previously filed for divorce in November 2006, but the parties reconciled. On April 11, 2012, Maria again filed a complaint for divorce. On April 13, 2012, Maria prepared, and the trial court issued, an ex parte order for interim child support, custody, parenting time, and exclusive use of the marital home. The ex parte order provided sole physical custody of the minor children to Maria, and joint legal custody to both parties. Gregory filed a motion to rescind the ex parte order, and a hearing before a referee took place. After the hearing, the referee issued a recommendation and order that awarded the parties joint legal custody and Maria sole physical custody. Gregory objected to the recommendation, and a de novo hearing was scheduled. In November 2012, Maria was granted a restraining order against Gregory. Before the de novo hearing occurred, the parties stipulated to binding arbitration of (a) child custody, (b) parenting, (c) child support, (d) spousal support, (e) property/debt, and (f) fees and costs. An arbitration hearing was held at which exhibits were admitted and testimony was taken. The arbitrator awarded Maria sole legal and physical custody of the children.

Gregory filed a motion to vacate the arbitration award, arguing that the arbitrator exceeded her authority and was partial toward Maria. Soon after, Maria filed a response to the motion to vacate the arbitration award, and also filed a motion for entry of the judgment of divorce. After a hearing on the motions and conducting a de novo review of the evidence before

the arbitrator, the trial court denied the motion to vacate the arbitration award. The trial court thereafter entered the order to lift the stay, confirm the arbitration award and enter the judgment of divorce, as well as entered the judgment of divorce.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion to vacate or modify an arbitration award. This means that we review the legal issues presented without extending any deference to the trial court.

Judicial review of arbitration awards is usually extremely limited, and that certainly is the case with respect to domestic relations arbitration awards. Through MCL 600.5081(2), the Michigan Legislature has provided four very limited circumstances under which a reviewing court may vacate a domestic relations arbitration award:

> (a) The award was procured by corruption, fraud, or other undue means.
>
> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

MCL 600.5081(2)(c), "the arbitrator exceeded his or her powers" provision, is the codification of a phrase used for many years in common-law and statutory arbitrations. Indeed, our Court has repeatedly stated that "arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." Pursuant to MCL 600.5081(2)(c), then, a party seeking to prove that a domestic relations arbitrator exceeded his or her authority must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law.

Whether an arbitrator exceeded his or her authority is also reviewed de novo. A reviewing court may not review the arbitrator's findings of fact, and any error of law must be discernible on the face of the award itself. By "on its face" we mean that only a legal error "that is evident without scrutiny of intermediate mental indicia," will suffice to overturn an arbitration award. Courts will not engage in a review of an "arbitrator's 'mental path leading to [the] award.' " Finally, in order to vacate an arbitration award, any error of law must be "so

substantial that, but for the error, the award would have been substantially different."[1]

"Arbitration agreements are generally interpreted in the same manner as ordinary contracts."[2] In other words, "[t]hey must be enforced according to their terms to effectuate the intentions of the parties."[3] "To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract."[4]

I. CUSTODY DETERMINATION

Gregory first contends that the arbitrator exceeded her authority, by acting in contravention of controlling law, in awarding Maria sole legal custody without finding that an established custodial environment existed with both parties and without establishing the proper burden of proof. Gregory asserts that, as a result, the trial court erred in failing to vacate the award and entering the judgment of divorce. We disagree.

"[T]he Child Custody Act[5] requires a trial court to independently determine what custodial placement is in the best-interests of the children."[6] "MCL 600.5080 authorizes a circuit court to modify or vacate an arbitration award that is not in the best interests of the child. It requires the circuit court to review the arbitration award in accordance with the requirements of other relevant statutes, including the Child Custody Act."[7] "In relation to child custody cases, we review the trial court's findings of fact pursuant to the 'great weight of the evidence' standard, and discretionary rulings, including the court's ultimate determination of custody, for an abuse of discretion."[8] "[A]ll orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue."[9]

---

[1] *Washington v Washington*, 283 Mich App 667, 671-672; 770 NW2d 908 (2009) (citations omitted).

[2] *Bayati v Bayati*, 264 Mich App 595, 599; 691 NW2d 812 (2004).

[3] *Id.*

[4] *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000).

[5] MCL 722.21 *et seq*.

[6] *Bayati*, 264 Mich App at 597 (footnote added).

[7] *Harvey v Harvey*, 470 Mich 186, 193; 680 NW2d 835 (2004).

[8] *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451; 705 NW2d 144 (2005) (citation omitted).

[9] MCL 722.28.

A. ESTABLISHED CUSTODIAL ENVIRONMENT

"The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.' "[10] It is an environment "of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child."[11] "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence."[12]

"The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian."[13] An established custodial environment "can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order."[14] The custody order in place is irrelevant to this analysis.[15] Instead, "the focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment."[16]

The arbitrator found that an established custodial environment existed with Maria alone. After making an independent review, the trial court also found that an established custodial environment existed with Maria alone.

Gregory's assertion that an established custodial environment existed with him based on the ex parte order giving the parties joint legal custody is without merit. As discussed above, the custody order is irrelevant to the determination of an established custodial environment.[17] A review of the evidence presented to the arbitrator supports the finding that the established custodial environment existed with Maria only. Evidence was presented that Gregory was under investigation by Child Protective Services for his alleged abuse of the eldest child. As a result, in April 2012, Maria retained sole physical custody of the minor children throughout the pendency of the proceedings. During that time, the children were exclusively residing with Maria in the marital home, and Gregory only visited the children once per week in a supervised visit. The psychological evaluation of Gregory outlined concerns regarding Gregory's anger issues, mental health, and the emotional abuse of the eldest child. Gregory had a detached

---

[10] *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c).

[11] *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

[12] *Id*.

[13] *Id.* at 706-707.

[14] *Id*. at 707.

[15] *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

[16] *Id.*

[17] *Hayes*, 209 Mich App at 388.

relationship with the eldest child who did not want any parenting time with his father. The evidence established that Maria provided more appropriate care, discipline, love, guidance, and attention.[18] Therefore, the determination that an established custodial environment existed only with Maria is not against the great weight of the evidence.[19]

B. BURDEN OF PROOF

Gregory also argues that he should not have had to prove by clear and convincing evidence that it was in the best interest of the children to maintain joint legal custody, and that the burden was on Maria because she was seeking to change the custody arrangement. The trial court may not "modify or amend its previous judgments or orders or issue a new order *so as to change the established custodial environment* of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."[20] If the proposed change would modify the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest.[21] Contrarily, if the proposed change would not alter the custodial environment, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the best interest of the child.[22]

It is clear that Gregory wanted to maintain joint legal custody and Maria wanted sole legal custody; thus, Maria was seeking to change legal custody. It is also evident, however, that Gregory was seeking joint physical custody (specifically, a 2-2-5-5 parenting schedule), which constituted a change from the sole physical custody provided to Maria in the ex parte order. Because both parties were seeking to change custody of the minor children, both parties had a burden of proof. The arbitrator clearly erred in imposing a burden only on Gregory. However, for the reasons discussed below, but for this error, the award would not have been substantially different.[23]

With regard to Maria's proposed change, awarding her sole legal custody would not alter whom the children naturally look to for guidance, discipline, necessities of life, and parental comfort.[24] Joint legal custody means that parents share decision-making authority regarding the important decisions affecting the welfare of the children.[25] Despite the fact that Gregory had joint legal custody during the pendency of the matter, the evidence shows that Maria was the

---

[18] See *Berger*, 277 Mich App at 706.

[19] See MCL 722.28.

[20] MCL 722.27(1)(c) (emphasis added).

[21] *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010).

[22] *Id.*

[23] *Washington*, 283 Mich App at 672.

[24] MCL 722.27(1)(c).

[25] MCL 722.26a(7)(b); *Pierron*, 486 Mich at 85.

primary caregiver, and Gregory only spent very limited time with the children. Evidence was also presented that his relationship with the eldest child was detached. Because altering the decision-making authority in this case would not change whom the children naturally look to for guidance, discipline, necessities of life, and parental comfort, Maria's proposed change would not modify the established custodial environment.[26] Accordingly, Maria did not have the increased burden of clear and convincing evidence.[27]

Gregory's proposed change to joint physical custody, however, would alter whom the children naturally look to for guidance, discipline, necessities of life, and parental comfort.[28] Gregory sought a 2-2-5-5 parenting time schedule, under which the children would spend equal time with him. Because this proposed change would alter the established custodial environment, he was required to show by clear and convincing evidence that the change was in the children's best interest.[29]

Contrary to Gregory's assertion, the trial court properly articulated the burdens of proof in this case. Although it initially placed the burden on Gregory, the trial court ultimately concluded that Gregory failed to show by clear and convincing evidence, or even a preponderance of the evidence, that custody should be changed to joint legal and physical custody. It also concluded that Maria established by a preponderance of the evidence that she should have full custody. Accordingly, it upheld the arbitrator's award of sole legal and physical custody to Maria. Given that any error of law by the arbitrator did not result in a substantially different award, the trial court properly denied the motion to vacate the arbitrator's award.[30]

II. ARBITRATOR'S AUTHORITY

Gregory next contends that the arbitrator exceeded her authority by (1) depriving him of daily phone contact with the children, (2) forever barring spousal support, (3) preserving the temporary restraining order against him, (4) awarding an assignment of the federal tax exemptions to Maria, and (5) awarding a full release between the parties. We disagree.

Gregory first argues that the arbitrator exceeded her authority in failing to award him daily phone contact with the children, which altered the established custodial environment. Although Gregory was granted daily phone contact with the children in the recommendation by the referee, the arbitrator's failure to include daily phone contact in the award did not "change whom the child[ren] naturally look[] to for guidance, discipline, the necessities of life, and parental comfort."[31] Given the lack of communication between the parties and Gregory's lack of

---

[26] MCL 722.27(1)(c).

[27] See *Shade*, 291 Mich App at 23.

[28] MCL 722.27(1)(c).

[29] See *Shade*, 291 Mich App at 23.

[30] See *Washington*, 283 Mich App at 672.

[31] *Pierron*, 486 Mich at 86.

involvement in the children's lives, the failure to specifically provide for daily phone contact between Gregory and the children did not alter the established custodial environment. Moreover, under the terms of the arbitration agreement, the arbitrator was conferred with the power to decide issues regarding parenting and child custody, which would include a decision to not allow for daily phone contact between Gregory and the children. Therefore, the arbitrator did not exceed her authority, and the trial court properly denied the motion to vacate the award on this basis.[32]

Gregory next argues that the arbitrator exceeded her authority by forever barring spousal support, and the trial court erred in modifying the judgment of divorce instead of vacating the arbitrator's award. In the award, the arbitrator included the phrase, "spousal support will not be awarded to either party, and it is forever barred." The trial court found that the arbitrator exceeded her power in including the phrase "forever barred" because the parties did not waive the ability to modify spousal support in their agreement for arbitration. As a result, the trial court struck this language from the award, and the judgment of divorce provided, "that neither of the parties hereto are entitled to any alimony/spousal support." Given that the trial court did not include this language in the judgment of divorce, which is the final order in this action, the issue is moot.[33] Further, although MCL 600.5081(2)(c) provides that the court "shall vacate an award" if the "arbitrator exceeded his or her powers," there is no indication that the arbitrator acted beyond the material terms of the arbitration agreement when she included the phrase "forever barred."[34] This determination was arguably within the clause providing for arbitration of spousal support and was not expressly exempt from arbitration.[35] Therefore, there was no error by the trial court.[36]

Gregory also asserts that the arbitrator exceeded her authority in preserving the temporary restraining order against him, in violation of the court rules.[37] MCR 3.207(C)(5) provides: "A temporary order remains in effect until modified or until the entry of the final judgment or order." However, MCR 3.207(C)(6) provides: "A temporary order not yet satisfied is vacated by the entry of the final judgment or order, unless specifically continued or preserved." Because the reasons for the temporary order continued to persist, and the arbitration award provided, "[t]he November 2, 2012 Temporary Restraining Order is preserved and shall be incorporated in the Judgment," the arbitrator did not act in contravention of controlling law in preserving the

---

[32] See *Washington*, 283 Mich App at 671-672.

[33] *Mich Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997) ("An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.").

[34] See *Washington*, 283 Mich App at 672.

[35] See *Watts*, 242 Mich App at 608.

[36] See *Washington*, 283 Mich App at 671.

[37] MCR 3.207(C)(5).

restraining order. Accordingly, the trial court did not err in denying Gregory's motion to vacate the arbitration award on this basis.[38]

Gregory further claims that the arbitrator exceeded her authority in awarding an assignment of the federal tax exemptions to Maria. As explained above, the arbitrator was conferred with the power to decide child support issues in the arbitration agreement. The determination of the federal tax exemptions was arguably within the clause providing for arbitration of child support and was not expressly exempt from arbitration.[39] Accordingly, the arbitrator did not act beyond the material terms of the agreement, and the trial court did not err in denying Gregory's motion to vacate the award, and in entering the judgment of divorce with the inclusion of the provision regarding federal tax exemptions.[40]

Lastly, Gregory argues that the arbitrator exceeded her authority in awarding a full release of claims between the parties, and the trial court violated his due process rights by entering the judgment of divorce incorporating this full release of tort liability without a hearing. Gregory failed to raise this issue at any point in the lower proceedings, including in his motion to vacate the arbitration award. "Issues and arguments raised for the first time on appeal are not subject to review."[41] Therefore, this Court need not consider this unpreserved issue. In any event, the issue of releasing tort liability is arguably within the arbitration clause that provides that the arbitrator is conferred with the jurisdiction to decide "Property/Debt."[42] Moreover, the arbitrator was not expressly exempt from making a determination on this issue.[43] Therefore, the arbitrator did not exceed her authority and, thus, the trial court correctly denied Gregory's motion to vacate the award on this ground.[44]

III. SWEARING IN OF ARBITRATOR

Finally, Gregory contends that the arbitration proceedings were invalid because the arbitrator was not sworn in. We disagree.

MCR 3.602(E)(1) provides: "Before hearing testimony, the arbitrator must be sworn to hear and fairly consider the matters submitted and to make a just award according to his or her best understanding." A review of the arbitration proceedings indicates that although the arbitrator did not take the arbitrator's oath on the record, she indicated on the record that the oath had been taken. Because MCR 3.602(E)(1) does not require that the oath be taken on the record,

---

[38] See *Washington*, 283 Mich App at 671.

[39] See *Watts*, 242 Mich App at 608.

[40] See *Washington*, 283 Mich App at 671-672.

[41] *In re Forfeiture of Certain Personal Prop*, 441 Mich 77, 84; 490 NW2d 322 (1992).

[42] See *Watts*, 242 Mich App at 608.

[43] See *id*.

[44] See *Washington*, 283 Mich App at 671-672.

and the record suggests that the oath was taken, the trial court properly denied Gregory's motion to vacate the award on this ground.[45]

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[45] See *id*. at 671.